

with the information disclosure obligations and non-discrimination requirements imposed in Sections 273(c) and 273(e) of the Act.⁴¹

IV. BOC INFORMATION DISCLOSURE REQUIREMENTS [Section 273(c); NPRM ¶¶ 13-30]

A. Information on Protocols and Technical Requirements [Section 273(c)(1); NPRM ¶¶ 13-25]

1. Nature and Scope of Disclosure Requirements

In its NPRM, the Commission invites comment on the relationship between the information disclosure provisions of Section 273(c) and other provisions of the 1996 Act,⁴² and the existing FCC Parts 64 and 68 disclosure requirements.⁴³ As TIA indicated in its comments in CC Docket No. 96-149, the FCC's existing information disclosure requirements are inadequate to satisfy the requirements of Section 272(c)(1).⁴⁴ As the Commission's NPRM acknowledges, these

⁴¹ See Sections IV and VI, *infra*. The NPRM specifically requests comment on the relationship between Section 273(b)(2) authority and BOC information disclosure requirements, *e.g.*, Sections 251(c)(5), 251(e)(2), and 273(c)(1). NPRM, Paragraph 12. In this regard, to the extent a BOC wishes to convey information that falls within the scope of the disclosure requirements of sections 251 or 273 (or the non-discrimination provisions of Section 272), any arrangement it enters into with a manufacturer pursuant to Section 273(b)(2) must be configured in a manner consistent with the BOC's obligations under each of these sections.

⁴² Other relevant 1996 Act provisions include the network information disclosure provisions contained in Section 273(c) and 251(c)(5), as well as Section 272(c)(1), as it relates to the treatment of information disclosed by a BOC to its separate affiliate.

⁴³ See NPRM, Paragraphs 15 and 25.

⁴⁴ See TIA Initial Comments, CC Docket No. 96-149, at 39-40.

requirements are not sufficient to satisfy the specific requirements or the underlying purposes of Section 273 as well.⁴⁵

As the discussion below indicates, TIA believes that it is critical that the rules adopted by the Commission ensure that all manufacturers are afforded timely and non-discriminatory access to information concerning the BOC's local networks and changes thereto that affects the ability of manufacturers to design and market telecommunications equipment or CPE. The information disclosure rules proposed by TIA are designed to meet this objective, consistent with the provisions of Section 273(c) and other relevant sections of the Act.

While the scope of information covered by the Section 251(c)(5) disclosure requirement appears to overlap to some extent with the existing rules and the Section 272 and 273 requirements, these requirements impose obligations that differ in certain respects as well. Accordingly, in developing proposed rules implementing the information disclosure provisions of Section 273 and the related requirements of Section 272(c)(1), TIA has attempted to utilize approaches that are consistent with those reflected in the rules adopted by the Commission in implementing the Part 51 information disclosure requirements, to the extent that the use of a similar approach does not conflict with the language and purposes of the Section 273 provisions.

⁴⁵ NPRM, Paragraph 18. As TIA's comments in the Section 272 non-accounting safeguards proceeding indicate, the current rules focus on the disclosure of information that affects intercarrier connection or the manner in which CPE connects to the network, and do not address the disclosure of information needed to manufacture and market equipment for use in the BOCs' networks. *Id.* at 39. Accordingly, TIA agrees with the NPRM's tentative conclusion in Paragraph 18 that the existing rules do not satisfy the requirements of Section 273(c)(1).

As a threshold matter, the NPRM also solicits comment on whether the Section 273(c) information disclosure requirements apply to all BOCs or only those that are authorized to manufacture under Section 273(a).⁴⁶ As the Commission recognizes, Section 273(c) by its terms applies to all BOCs.⁴⁷ To construe this provision as applying only to BOCs that have been authorized to manufacture under Section 273(a) could lead the BOCs to withhold information that would otherwise be subject to disclosure until they receive such authorization. Moreover, such a narrow reading could serve to encourage discrimination by a BOC in favor of non-"affiliate" manufacturers in which it has a financial interest (e.g., a royalty interest or an equity or equivalent interest of 10 percent or less).

2. Timing of Disclosure

In its NPRM, the Commission specifically requests comment on the relative costs/benefits of "early" versus "late" disclosure, as well as whether an exemption for "bona fide equipment trials," similar to that adopted in the Commission's order implementing the requirements of Section 251(c)(5), should be considered in the Section 273(c)(1) context as well.⁴⁸ While the literal terms of Section 273(c) appear to give the FCC some discretion as to the timing of disclosures, the central purposes of Section 273 (i.e., preserving competition in manufacturing and avoiding anticompetitive discrimination) are better served by a general rule that requires "early" disclosure of information concerning the BOC networks and potential

⁴⁶ NPRM, Paragraph 17.

⁴⁷ Id.

⁴⁸ Id., Paragraphs 19, 22.

changes thereto. Such a rule would minimize the risk associated with a BOC's advance disclosure of information to its manufacturing "affiliates" or other entities.

In this regard, TIA notes that the "make/buy" decision frequently occurs too late in the development process for competitors to effectively respond. For this reason, its use as the "trigger" for public disclosure obligations under the existing network disclosure rules has long been criticized as inadequate to prevent carriers from gaining an unfair competitive advantage in the development and deployment of new or modified products and services which connect to the affected carriers' networks.⁴⁹ This shortcoming assumes even greater significance to the extent that the BOCs are allowed to engage directly or indirectly in the manufacture of telecommunications equipment and CPE. Clearly, issues relating to the timing of disclosure under Section 273(c) must be viewed in this new context.

In configuring rules implementing the provisions of Section 273(c), it is also important to take into account the impact of other provisions that impose related obligations barring BOC discrimination in the area of information disclosure. As TIA has previously observed, Section 272(c)(1) imposes an independent statutory obligation on each BOC to make any and all information provided to its manufacturing affiliate(s) available to all manufacturers on a non-discriminatory basis. To the extent that this provision is effectively implemented and

⁴⁹ See e.g., Report and Order, In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd. 7571, 7603 (citing IDCMA comments expressing concern that the network disclosure rules "actually advantage the BOCs in their provision of enhanced services . . . because public disclosure of network information is not required at the time the information is actually given to the BOCs' unregulated services personnel but, rather, at the make/buy point, which may be substantially later.")

enforced, concerns relating to the potential "headstart" which carrier-affiliated entities may enjoy under the existing network disclosure rules should be significantly reduced. In addition, TIA believes that Section 273(e), which bars BOC discrimination in favor of affiliates or "related persons" in the procurement process,⁵⁰ necessarily requires each BOC to ensure that any information which it possesses that may affect the ability of a manufacturer to design and sell equipment, software and related services to the BOC is made available to all manufacturers on a non-discriminatory basis.

Pursuant to Section 273(c)(3), the Commission is authorized to "adopt such additional regulations under this subsection as may be necessary to ensure that manufacturers have access to the information with respect to the protocols and technical requirements for connection with and use of telephone exchange service facilities that a Bell operating company makes available to any manufacturing affiliate or any unaffiliated manufacturer."⁵¹ TIA strongly urges the Commission to exercise this authority and, if necessary, its authority under Section 273(g), to adopt rules which make it clear that, consistent with the requirements of Sections 273(c)(2),⁵² 272(c)(1), and 273(e), a BOC that discloses any network-related information to one manufacturer must make such information immediately available to all manufacturers on equal terms and conditions, irrespective of whether public disclosure is at that point otherwise required under Section 273(c)(1).

⁵⁰ 47 U.S.C. § 273(e)(1)(B).

⁵¹ 47 U.S.C. § 273(c)(3).

⁵² 47 U.S.C. § 273(c)(2). See discussion in Section IV.B., infra.

Assuming that the potential for BOC discrimination is constrained in this manner, TIA believes it may be appropriate to continue to utilize the "make/buy" point, at least initially, for purposes of implementing the network disclosure requirements imposed under Section 273(c)(1). TIA's proposed rules implementing Section 273(c)(1) generally would require disclosure of network changes at the "make/buy" point, but at least 12 months prior to implementation. Where changes can be implemented on less than 12 months notice, disclosure would be required at the make/buy point, but at least 6 months before implementation. TIA also supports adoption of an exemption from the general rule for "bona fide equipment trials," similar to that described by the Commission in its order implementing the Section 251(c)(5) network disclosure requirement.⁵³

3. Method of Disclosure

The NPRM also requests comment on the form and manner in which required information should be maintained and made available, and tentatively concludes that "one method" of satisfying BOC obligations to "maintain" information in accordance with Section 273(c)(1) would be to place information in publicly-accessible World-Wide Web sites, or

⁵³ See Second Report and Order and Memorandum Opinion and Order, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-33 (released August 8, 1996), Paragraph 260. The purpose of such an exemption is to protect the proprietary information of a manufacturer during the course of a market or technical trial on a BOC network. Such trials should not be permitted to serve as a mere pretext for preferential disclosures of network information that affects the ability of manufacturers to design and sell equipment for use in or connection to the BOC network. In order to prevent abuse of this exemption, TIA proposes that the BOCs be required to advise the Commission and provide public notice of the commencement of network trials involving BOC-affiliates or other "related persons." See discussion of the term "related persons" in Section VI.B., infra.

to make files available through other Internet protocols (e.g., File Transfer Protocol ("FTP"), Gopher, or E-mail).⁵⁴ While the use of Web sites or other on-line access could make it easier for manufacturers to track BOC filings, Section 272(c)(1) requires the BOCs to "maintain and file" network-related information "with the Commission." Consistent with the language of the statute and in order to prevent abuses involving manipulation of information subject to disclosure, TIA proposes that the BOCs be required, at a minimum, to prepare and submit to the Commission an "official" paper copy, as well as a diskette copy in a format that complies with the requirements established for notices filed pursuant to Section 251(c)(5).⁵⁵ Adoption of a standard format for BOC filings also would help to make such information more readily accessible and useful to manufacturers. TIA's proposed rules would require notices filed pursuant to Section 273(c) to comply with standard format and content requirements similar to those adopted by the Commission in implementing the Section 251 network disclosure provisions.

4. Content of Disclosure

The NPRM invites comment on whether the BOCs should be obliged to disclose technical information and protocols pursuant to Section 273(c)(1) "at the highest level of disaggregation feasible."⁵⁶ In order to ensure adequate disclosure of network-related information that may affect the manufacture and/or operation of equipment designed for use in or connection

⁵⁴ NPRM, Paragraphs 20-21.

⁵⁵ In addition, TIA supports creation of a central on-line point of contact for gaining access to materials describing BOC technical requirements and protocols (or providing information concerning how to access the relevant materials). See NPRM, Paragraph 23.

⁵⁶ NPRM, Paragraph 24.

to the BOCs' networks, TIA urges the Commission to require, at a minimum, that the BOCs be required under Section 273(c)(1) to disclose all protocols and other technical requirements for connection with and use of any of the BOC's designated points of interconnection and all BOC network elements, including information relating to 1) connections between BOC network elements, and 2) connections between customer premises equipment and BOC network elements. In addition, consistent with the approach adopted in implementing the Section 251(c)(5) network disclosure requirement, the Commission should adopt rules providing for the disclosure of proprietary or confidential information which falls within the scope of Section 273(c), pursuant to an appropriate non-disclosure agreement.

B. Non-Discrimination Requirements [Section 273(c)(2)-(c)(3); NPRM ¶¶ 26-28]

TIA agrees with the Commission's tentative conclusion that Section 273(c)(2), which bars BOCs from disclosing information required under Section 273(c)(1) unless it has been "filed promptly," means that BOCs may not disclose such information until it is publicly available, i.e., filed with the Commission.⁵⁷ The BOCs should not be permitted to disclose network-related information to a particular manufacturer for even a brief period in advance of public disclosure.

With regard to the relationship between 273(c)(1) filing requirements and the "close collaboration" provision in Section 273(b)(1), TIA agrees with the Commission that it is important to ensure that "close collaboration" does not result in the "communication of technical information and protocols in advance of the disclosure requirements contained in Section 273(c)(2)."⁵⁸ As the discussion in Section III.A. above indicates, activities undertaken by

⁵⁷ NPRM, Paragraph 26.

⁵⁸ Id., Paragraph 27.

a BOC pursuant to the "close collaboration" provision of Section 273(b)(1) are not exempt from the non-discrimination requirements of Section 272(c)(1) or the disclosure requirements of Section 273(c). The statute merely permits a BOC to engage in such activities both before and after its receipt of manufacturing approval pursuant to Section 273(a). While Section 272(c)(1) applies only where a BOC is providing or procuring goods, services, or information to or from its separate affiliate(s), the general disclosure requirements of Section 273(c)(1) and the ban on advance disclosures in Section 273(c)(2) bar premature disclosure of information which falls within the scope of these provisions to an affiliate or third-party manufacturer.⁵⁹

V. BELLCORE; STANDARDS/CERTIFICATION PROVISIONS [Section 273(d); NPRM ¶¶ 31-62]

A. Definitional Issues [Section 273(d)(8); NPRM ¶¶ 31-34]

In most respects, TIA agrees with the Commission's tentative conclusion that the definitions of terms provided in Section 273(d)(8) appear "complete and self-explanatory."⁶⁰ However, as the Commission recognizes, the term "standards" is not defined in this section or any other section of the 1996 Act.⁶¹ In its comments in CC Docket No. 96-149, TIA argued that for purposes of Section 272(c)(1) this term should at a minimum encompass "all activities undertaken

⁵⁹ To the extent there is any uncertainty on this point, the Commission can and should invoke its authority under Section 273(g) and Section 273(c)(3) to ensure that the BOCs do not discriminate in favor of particular manufacturers, including those non-"affiliate" manufacturers in which they have a financial interest. See discussion in Section IV.A., supra.; also see TIA Proposed Rules, Appendix A, § 53.303(b)(2).

⁶⁰ NPRM, Paragraph 34.

⁶¹ Id.

in connection with a BOC's efforts to establish technical specifications for BOC network operation, the interconnection of equipment and services to the BOC's network, and the BOC's own procurement of 'goods' or 'services.'"⁶² TIA believes that the current proposed revision of OMB Circular No. A-119⁶³ provides an acceptable starting point for the development of a more comprehensive definition of the term "standard" that could be employed for purposes of Section 272(c)(1) and Section 273(d). The definition of "standard" proposed in the OMB's revised circular excludes "standards adopted by individual companies." TIA believes that a "single-company" exclusion is appropriate in this context, in order to avoid the unwarranted application of Section 273(d) requirements to an individual manufacturer's establishment of technical specifications for its products. However, it would be inappropriate and wholly inconsistent with the underlying purposes of Sections 272 and 273 to extend such an exclusion to an individual BOC's establishment of technical specifications for its network interfaces or procurement specifications for products it seeks to purchase for use in its network. It would eviscerate Section 272(c)(1) and Section 273(d) to exclude the BOCs' establishment of technical standards and related activities.⁶⁴ Accordingly, TIA's proposed definition of the term "standard"

⁶² TIA Initial Comments, CC Docket No. 96-149, at 44.

⁶³ See Notice and Request for Comments on Proposed Revision of OMB Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," 61 Fed. Reg. 68312 (December 27, 1996). The proposed revision to OMB Circular No. A-119 was developed to implement the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), P.L. 104-113.

⁶⁴ Adoption of a definition of "standard" which contains a "single-company" exclusion that extends to the network standards and certification activities of the BOCs would create a wholesale exemption from the non-discrimination obligations and other requirements of

qualifies the exclusion for "standards of individual companies," to ensure that "generic requirements and other standards issued or adopted by or on behalf of a BOC" are included.

In addition, TIA believes that clarification of the term "certification," as defined in Section 273(d)(8), is required, in order to ensure that the provisions of Section 273(d) are not inappropriately applied to the activities of individual manufacturers. In this regard, TIA urges the FCC to clarify the phrase "specified requirements," as used in Section 273(d)(8)(D), to make it clear that the interoperability testing activities of individual manufacturers do not constitute "certification" and that such activities therefore fall outside the scope of Section 273(d).

B. Belcore Manufacturing [Section 273(d)(1); NPRM ¶¶ 35-38]

In its NPRM, the Commission tentatively concludes that Section 273(d)(1) bars Belcore from manufacturing only as long as it is 1) affiliated with two or more otherwise unaffiliated RHCs; 2) affiliated with two or more BOCs that are not under the ownership or control of the same RHC, and are not otherwise affiliated; or 3) affiliated with an RHC and a BOC that is not otherwise affiliated with that RHC.⁶⁵ TIA agrees with the Commission's tentative conclusion, assuming that its use of the term "BOC" includes all entities that fall within the statutory definition of "Bell Operating Company," including any "successor or assign" of any such company.

However, TIA does not believe that the Commission is in a position to conclude, even tentatively, based on the limited information before it, that if the announced sale of Belcore

Section 272(c)(1) and Section 273(d) for activities which these provisions were specifically designed to address.

⁶⁵ NPRM, Paragraph 37.

to Science Applications International Corporation ("SAIC") is consummated, Bellcore would no longer be considered a BOC, a BOC affiliate, or a BOC successor or assign, and would therefore be permitted to manufacture telecommunications equipment and CPE, "in accordance with sections 273(d)(1)(B) and 273(d)(3)."⁶⁶ It is unclear on what basis the FCC has reached this tentative conclusion. The Commission's notice refers to briefing materials which Bellcore apparently provided to the Commission shortly before the release of the NPRM. The pamphlet obtained by TIA from the Commission, entitled "Bellcore Ownership in Transition," merely states that the RBOCs "have reached an agreement to sell Bellcore . . . to [SAIC],"⁶⁷ but does not provide further details as to the terms of the agreement.

Pursuant to Section 273(d)(1)(B), to the extent that Bellcore maintains an "affiliate" relationship with more than one "otherwise unaffiliated" BOC or "successor or assign" thereof, the manufacturing restriction remains in effect. Accordingly, the restriction applies so long as more than one such BOC entity either 1) owns direct or indirect equity interests (or the equivalent thereof) in excess of the limits established in Section 273(d)(8)(A), or 2) exercises "control" over Bellcore (directly or indirectly).⁶⁸

⁶⁶ Id., Paragraph 38.

⁶⁷ See Bellcore Ownership in Transition, undated briefing materials received by the Commission December 4, 1996, "Buyer Profile Overview," at 1.

⁶⁸ See 47 U.S.C. § 273(d)(8)(A); 47 U.S.C. § 153(33). Among other things, the volume and percentage of Bellcore's revenues attributable to its contracts with the RBOCs, in relation to its business with other entities, as well as any rights retained by the BOCs with respect to the activities or assets (e.g., patent rights) of Bellcore, would appear relevant to an assessment as to whether the RBOCs retain de facto "control" over Bellcore.

The briefing materials submitted by Bellcore merely assert, without further explanation, that after the proposed sale Bellcore will be "independent of the Regional Bell Operating Companies,"⁶⁹ and state that while "Bellcore has no plans to enter into the manufacturing business," it believes that "after it is sold it is not precluded from doing so."⁷⁰ However, a definitive determination as to whether the manufacturing restriction will still apply cannot be made in the absence of more specific details concerning the financial terms of the proposed transaction and the future relationship of the RBOCs (individually and collectively), Bellcore, and the new National Telecommunications Alliance ("NTA") which is to be formed by the RBOCs (and, at least initially, supported by Bellcore) for the purpose of addressing network integrity and national security and emergency preparedness ("NS/EP") concerns.⁷¹

Irrespective of whether Bellcore remains an "affiliate" of the BOCs, TIA believes that Bellcore's ongoing involvement in the development of standards and generic requirements, as well as product certification, places it squarely within the scope of Section 273(d)(2)'s requirements, which bar entities engaged in such activities from releasing or using any

⁶⁹ Bellcore Ownership in Transition, "Why the Regional Bell Operating Companies Are Selling Bellcore," at 3.

⁷⁰ Bellcore Ownership in Transition, "Questions and Answers," at 8.

⁷¹ In its briefing materials, Bellcore states that "the RBOCs will continue to meet their commitments to National Security and Emergency Preparedness (NS/EP) and coordinate their efforts for network reliability through the formation of a new entity, the National Telecommunications Alliance (NTA). Bellcore will continue to be a critical player in developing network integrity solutions, as well as providing necessary services in support of the RBOCs' NS/EP commitments through negotiated contracts with NTA and each regional company." Id. at 5.

manufacturer's proprietary information which is in its possession as a result of such activities for any purposes other than those authorized in writing by the owner of such information.⁷²

C. Protection of Proprietary Information [Section 273(d)(2); NPRM ¶¶ 39-42]

Section 273(d)(2) prohibits any entity which "establishes standards for telecommunications equipment or [CPE], or generic requirements for such equipment, or certifies telecommunications equipment or [CPE]" from releasing or using any proprietary information it acquires in the course of such activities, for any purpose other than those authorized by the owner of such information.⁷³ To the extent that accredited SDOs are deemed to fall within the scope of Section 273(d)(2), TIA believes that its current practices are fully consistent with the requirements of this provision.⁷⁴ However, TIA does not believe that Congress intended to regulate the activities of accredited standards development organizations ("SDOs") in Section 273(d), which is generally designed to prevent abuses arising in the context of standards-related activities undertaken by entities which are not subject to the procedural protections and oversight inherent in the operations of accredited SDOs. Accordingly, TIA's proposed definition of the term "standard," for purposes of Section 273(d), which is based on the proposed Revised OMB Circular No. A-119, would exclude "standardization documents developed by accredited

⁷² See discussion in Section V.C., infra.

⁷³ 47 U.S.C. § 273(d)(2).

⁷⁴ With few exceptions, participants in TIA's technical standards activities do not submit information for consideration by the relevant committee on a confidential basis. In instances where the submitting party requests such treatment, the relevant TIA engineering committee determines whether to accept the submission on a confidential

[SDOs]."⁷⁵ In contrast, TIA believes that all non-accredited organizations, including Bellcore (irrespective of whether it remains affiliated with the BOCs) and industry forums (e.g., the ATM forum), that are engaged in the development of "standards" (as TIA proposes to define this term) fall within the scope of Section 273(d)(2).⁷⁶

TIA also believes that Section 273(d)(2) applies to ISO 9000 certification activities, to the extent that such activities constitute "certification" under Section 273(d)(8)(D). However, as the discussion above indicates, TIA believes that the definition of this term requires further clarification, and should be construed so as to exclude technical specifications and associated interoperability testing activities undertaken by individual manufacturers.⁷⁷ TIA further believes that Section 273(d)(2) encompasses the development by the BOCs or other carriers of "internal interfaces or protocols that might or might not be adopted more widely,"⁷⁸ but only to the extent that the requirements of this section do not conflict with the carrier's information

basis. If the committee agrees, the information is then made available to other participants pursuant to a non-disclosure agreement.

⁷⁵ TIA's proposed definition of "standard" also would exclude an individual manufacturer's development of technical specifications for its products. See discussion in Section V.A., supra.

⁷⁶ To the extent that the standards activities of such entities constitute "industry-wide" activities, as defined in Section 273(d)(8), they are subject to the requirements established in Section 273(d)(4) as well.

⁷⁷ See discussion at Section V.A., supra.

⁷⁸ See NPRM, Paragraph 40, n.74.

disclosure obligations under Section 273(c) and other relevant sections of the Communications Act or the Commission's rules.⁷⁹

With regard to enforcement of this section, TIA again urges the FCC to require the BOCs to establish and secure Commission approval of comprehensive compliance plans that describe the procedures and other mechanisms established by the BOCs to ensure compliance with the non-discrimination requirements and other safeguards adopted in Sections 272 and 273, which are designed to prevent anticompetitive behavior by the BOCs and related entities (including, in particular, Bellcore) in standard-setting and other areas (e.g., procurement, information disclosure).⁸⁰ Such plans should include, among other things, a description of the BOC's plans and procedures for ensuring compliance with the requirements of Section 273(d)(2).⁸¹ TIA does not believe that additional enforcement mechanisms are necessary at this time to ensure compliance with the requirements of this provision.⁸²

⁷⁹ See discussion in Section IV, infra.

⁸⁰ See discussion in Section VI.B. and VI.D., infra.

⁸¹ Similarly, TIA's proposed rules would require Bellcore to file with the Commission a description of the steps which it has taken and plans to take to ensure conformance with the requirements of Section 273(d)(2) and, to the extent applicable, Section 273(d)(3)(C)(ii) of the Act.

⁸² Within the near future, however, it may be necessary to consider the development of expedited procedures for resolving complaints raising issues under Section 273(d) which relate to the activities of non-carrier entities, including in particular the activities of an "independent" Bellcore.

D. Manufacturing by Certifying Entities [Section 273(d)(3); NPRM ¶¶ 43-48]

In its NPRM, the Commission tentatively concludes that if the sale of Bellcore to SAIC were consummated, "Bellcore would be permitted to engage in manufacturing activities, but would need to comply with the structural and accounting safeguards of Section 273(d)(3)."⁸³

As the discussion in Section V.B. above indicates, TIA believes it is premature for the Commission to conclude, even tentatively, that Bellcore will be free to manufacture, once the proposed sale to SAIC occurs. However, TIA agrees that if Bellcore satisfies the statutory criteria set forth in Section 273(d)(1)(B) and is therefore permitted to manufacture, it must comply with the structural and accounting safeguards of Section 273(d)(3), to the extent it falls within the scope of entities covered by this section, i.e., an entity that is engaged in manufacturing a particular "class" of equipment for which it "is undertaking or has undertaken" (during the previous 18 months) "certification" activities.

In response to the Commission's tentative conclusion that it should define specific "classes" of products for purposes of Section 273(d)(3),⁸⁴ TIA is currently in the process of reviewing product classification schemes developed by various government and private sector entities, including TIA, in an effort to identify appropriate classes of products for use in implementing the requirements of this section and Section 273(d)(6). While TIA has not yet identified a specific classification scheme that it considers appropriate for use in this context, TIA urges the Commission in considering this issue to strive for a balanced approach that seeks to

⁸³ NPRM, Paragraph 43.

⁸⁴ Id., Paragraph 44.

prevent potential abuses (e.g., the misuse of proprietary information received in conjunction with product certification to gain an unfair advantage in manufacturing similar or related products), while at the same time avoiding the imposition of unnecessary restrictions on the activities of certifying entities.⁸⁵

In its NPRM, the Commission tentatively concludes that Section 273(d)(3)(C) requires the entity engaged in product certification to "provide its services to its manufacturing affiliate on terms, conditions, or rates that are at least as good as those it provides to unaffiliated manufacturers."⁸⁶ TIA agrees with the FCC's tentative conclusion that its existing nondiscrimination rules are "inadequate in the context of Section 273(d)(3)(C)" and that Congress intended to impose a "stricter" standard under this provision, which imposes a "flat ban on all discrimination."⁸⁷ Such a construction is consistent with that adopted by the Commission in construing Section 272(c)(1), in its recent order in CC Docket No. 96-149.⁸⁸ However, the Commission's articulation of this standard in Paragraph 48 of its NPRM is (perhaps inadvertently)

⁸⁵ With regard to the Commission's request in Paragraph 46 of its NPRM for comment on the proper construction of the phrase "within the last 18 months," as used in Section 273(d)(3), it seems clear that this phrase (when read in context) refers to the period prior to the date on which the entity seeks to manufacture equipment, not the 18 month period prior to the effective date of the 1996 Act. The alternative reading described in the NPRM would sharply limit the application of the Section 273(d)(3) safeguards to include only those classes of products that an entity was certifying on or within 18 months prior to enactment, while exempting all classes of products which the entity began to certify at any time after enactment, a result which is wholly inconsistent with the clear intent of this provision, as described above.

⁸⁶ NPRM, Paragraph 48.

⁸⁷ Id.

⁸⁸ Non-Accounting Safeguards Order, supra, n.11, Paragraph 197.

flawed, and should be rephrased to make it clear that the certifying entity must provide its services to unaffiliated manufacturers on terms, conditions, and rates that are at least as good as those it provides to its manufacturing affiliate.

E. Standards and Certification Activities [Section 273(d)(4); NPRM ¶¶ 49-58]

**1. Development of Industry-Wide Standards, Generic Requirements
[Section 273(b)(4)(A); NPRM ¶¶ 49-54]**

In its NPRM, the Commission solicits comment on the application of Section 273(d)(4)'s provisions to Bellcore and other entities that may be engaged in the development of "industry-wide" standards or generic requirements, or product certification activities. While the NPRM states that at present "Bellcore would appear to fall squarely within the ambit of Section 273(d)(4)," the Commission seeks comment on "whether the sale of Bellcore to SAIC or another entity unaffiliated with the BOCs could affect the applicability of this section to Bellcore."⁸⁹

Without complete details concerning the arrangements for the sale of Bellcore to SAIC and the future relationship between Bellcore and the BOCs, it is of course difficult to determine definitively whether or to what extent these developments will affect the applicability of Section 273(d)(4) to Bellcore. The briefing materials which Bellcore provided to the Commission do indicate that the RBOCs plan to continue to maintain significant business relationships with Bellcore, following the proposed sale to SAIC, and refer to negotiations and contracts "that have already been finalized," covering "both annual and multiyear periods," which are "designed to ensure that the RBOCs continue to have available to them the products and services they

⁸⁹ NPRM, Paragraph 50.

require."⁹⁰ To the extent Bellcore continues to be involved (pursuant to its agreements with the RBOCs or otherwise) in the development of "industry-wide" standards or generic requirements, or "certification" activities, as defined in Section 273(d)(8), it will remain subject to the relevant provisions of Section 273(d)(4).⁹¹

With regard to the potential applicability of Section 273(d)(4) to other entities, including TIA and its members, TIA's views generally are consistent with those described in the discussion of Section 273(d)(2) above. In this case, however, the statute explicitly applies only to entities that are not accredited standards development organizations. Accordingly, TIA clearly is exempt. In contrast, all non-accredited entities that are in fact engaged in the development of industry-wide standards and generic requirements which fall within the scope of Section 273(d)(4), as defined above, including industry forums, must conduct their activities in accordance with the requirements of this section.⁹²

In its NPRM, the Commission asks whether it should adopt a precise definition of what constitutes a "substantial modification" to an "industry-wide" standard/generic requirement for purposes of Section 273(d)(4) or merely establish "factors that should be considered" in

⁹⁰ Bellcore Ownership in Transition, "Questions and Answers," at 7.

⁹¹ Indeed, the briefing materials submitted by Bellcore acknowledge that "[t]here are specific provisions of the Telecommunications Act of 1996 . . . which pertain to certain functions performed by Bellcore that the company is prepared to address and be in full compliance." Id.

⁹² As TIA has indicated, the activities of individual manufacturers in establishing technical specifications and conducting interoperability testing for their products should not be considered to fall within the scope of the requirements established in Section 273(d)(4) for entities engaged in the development of "industry-wide" standards or generic requirements or product certification. See discussion at Section V.A., supra.

determining what constitutes a "substantial modification," e.g., impact on network reliability, performance, security, and interoperability.⁹³ In TIA's view, it would appear difficult, if not impossible to adopt a comprehensive definition of what constitutes a "substantial modification." With regard to the factors which should be considered in making such a determination, TIA believes that in addition to those identified by the Commission, changes which affect the cost of manufacturing, product design, product testing, or manufacturing processes, or that would result in the foreclosure of particular manufacturers' products should be considered "substantial." In addition, a change to any of the primary components of a Bellcore generic requirement (i.e., product definition, requirements, objective, test methods, or rationale) should be deemed to constitute a substantial modification.

The NPRM also seeks comment on the best means of implementing the "public notice" requirement established in Section 273(d)(4)(A)(i), which requires that an entity subject to Section 273(d)(4) "issue a public notice of its consideration of a proposed industry-wide standard or industry-wide generic requirement."⁹⁴ The Commission tentatively concludes that "publications such as the Bellcore Digest of Technical Information and publications on the World Wide Web similar to that of the ATM Forum would constitute adequate public notice," because they are "available to the public at reasonable expense, provide a summary of the proposed work, provide contact information, and set tentative dates for when the requirement or specification will be available."⁹⁵ The Commission also requests comment on "the role that the ATIS ["Alliance for

⁹³ NPRM, Paragraph 51.

⁹⁴ Id., Paragraph 52.

⁹⁵ Id., Paragraph 53.

Telecommunications Industry Solutions"] industry forums and TIA groups might play in ensuring interested parties have access to industry-wide generic requirement and standard development processes."⁹⁶

While the Bellcore Digest and similar Web-based publications can play a useful role in making industry participants and other affected parties aware of a covered entity's consideration of proposed industry-wide standards and generic requirements, TIA believes that it is important to establish a single point of access to information concerning all new and ongoing projects conducted under the auspices of entities subject to the requirements of Section 273(d)(4).⁹⁷ In addition, there should be mechanisms in place to ensure that manufacturers have ready access to an "official" printed copy of all notices issued with respect to projects which fall within the scope of Section 273(d)(4) which is complete and secure.

⁹⁶ Id.

⁹⁷ One possibility would be to establish a Web-page which would contain a list briefly identifying all new and ongoing projects by non-accredited entities involving the development of industry-wide standards or generic requirements, and providing other basic data (e.g., name of contact person at covered entity, project schedule, cross-references to relevant documents) which would allow interested persons to obtain more detailed information with respect to individual projects. Imposition of an obligation on Bellcore and other affected non-accredited entities to provide notice in this manner should not be unduly burdensome, and would parallel what ANSI-accredited SDOs currently do to inform interested parties of their standards development activities.

Establishment of such a mechanism also would be consistent with provisions contained in the North American Free Trade Agreement ("NAFTA") which require each party to the agreement to take "reasonable measures" to ensure that there is at least one "inquiry point" that is able to "answer all reasonable inquiries from other Parties and interested persons" and provide relevant documents (or information as to where they can be obtained) regarding "any standard or conformity assessment procedure proposed, adopted, or maintained by non-governmental standardizing bodies in its territory. . . ." North American Free Trade Agreement, Chapter 9, Article 910: Inquiry Points, Paragraph 3(a).

In its NPRM, Commission tentatively concludes that the definition of "funding party" adopted for purposes of the Section 273(d)(5) alternate dispute resolution procedure⁹⁸ should apply in the context of Section 273(d)(4)(A) as well, and that "the remainder of the requirements imposed by Section 273(d)(4)(A)(ii)-(v) are self-explanatory."⁹⁹ Indeed, it would appear difficult to argue for a different definition of "funding party" in the Section 273(d)(4) context than is employed for purposes of Section 273(d)(5). However, under Section 273(d)(4)(A)(ii), funding requirements must be "reasonable," "non-discriminatory," and administered so as not to "unreasonably exclude" any interested industry party. In this regard, TIA believes it is appropriate for the Commission to establish guidelines as to what types of funding arrangements will be deemed "reasonable", "non-discriminatory," and non-exclusionary. In particular, TIA believes that the Commission should consider prescribing the use of a "sliding-scale" approach to funding, of the sort currently employed by TIA, where member dues are based on revenues and voting rights are allocated on a "one vote per company" basis.¹⁰⁰ In addition, the Commission should make it clear that prospective participants should be given the opportunity to enter (or exit) and fund the non-accredited entity's standards or generic requirements projects at various stages (e.g., at start-up, at the feasibility study phase, during various testing phases, etc.). Allowing non-accredited entities to require prospective participants to make a large "up-front"

⁹⁸ See Report and Order, Implementation of Section 273(d)(5) of the Communications Act, 11 FCC Rcd 12955, 12969 (1996).

⁹⁹ NPRM, Paragraph 54.

¹⁰⁰ The adoption of a "one vote per company" approach is particularly critical, in order to ensure that the interests of smaller firms are adequately represented.

investment or financial commitment, at a point when the benefits of the particular project remain highly uncertain, would operate to effectively exclude many smaller manufacturers from the process and place them at a significant competitive disadvantage, a result which is clearly contrary to the express language of Section 273(d)(4) and inconsistent with the broader purposes of Section 273 and the 1996 Act as a whole.

2. Product Certification [Section 273(d)(4)(B); NPRM ¶ 55]

In its NPRM, the Commission seeks comment on the proper construction of the terms "published," "auditable criteria," and "available industry-accepted testing methods and standards" for purposes of determining compliance with the requirements imposed on entities engaged in "product certification" for "equipment manufactured by unaffiliated entities" under Section 273(d)(4)(B).¹⁰¹ In this regard, the Commission tentatively construes the phrase "auditable criteria" to mean "criteria that, when applied in a certification process, are sufficiently precise that a neutral third party would be able to replicate each certification and determine whether each certification had, or had not been performed in an unbiased manner."¹⁰² TIA believes that the Commission's tentative construction of the phrase "auditable criteria" appears reasonable. However, TIA believes that ISO Guides 25, 43 and 58 and other similar documents would provide more appropriate criteria for ensuring compliance with the requirements of Section 273(d)(4)(B) than the AICPA audit standards.¹⁰³

¹⁰¹ NPRM, Paragraph 55.

¹⁰² Id.

¹⁰³ There currently are programs at the National Institute of Standards and Technology ("NIST") that look at the competency of laboratories. The National Voluntary Laboratory Accreditation Program ("NVLAP") focuses on specific domestic technical requirements.

3. Anticompetitive Practices [Section 273(d)(4)(C)-(D); NPRM ¶¶ 56-57]

The NPRM invites comment on the implementation of Section 273(d)(4)(C), which bars any entity that is not an accredited standards development organization and that establishes "industry-wide" standards or generic requirements or that engages in certification activities from undertaking "any actions to monopolize or attempt to monopolize the market for such services."¹⁰⁴ In particular, the Commission asks whether it should "identify specific acts that would constitute per se violations " of this section, provide guidance as to what constitutes a prima facie showing of violation, and establish specific penalties (i.e., fines, forfeitures) for specific violations.¹⁰⁵ Given the broad range of conduct that could constitute violations of Section 273(d)(4)(C), TIA does not believe that such an approach is feasible. In light of the similarity of the language in the statute to Section 2 of the Sherman Act, antitrust precedents may be relevant. However, at this point, it does not appear that an effort to establish detailed rules in this area is either necessary or desirable. Should problems arise, the Commission can at that point make a determination as to whether to establish rules prohibiting or restricting specific anticompetitive practices.

The National Voluntary Conformity Assessment System Evaluation ("NVCASE") program evaluates laboratories to ensure competency to test products to foreign requirements. These NIST programs use international criteria such as ISO/IEC Guide 25, "General Requirements for the Competence of Testing and Calibration Laboratories," ISO/IEC Guide 43, "Development and Operation of Laboratory Proficiency Testing," and ISO/IEC Guide 58, "Calibration and Testing Laboratory Accreditation Systems - General Requirements for Operation and Recognition." TIA believes these and similar documents are better suited for purposes of assessing compliance in this context than AICPA criteria.

¹⁰⁴ NPRM, Paragraph 56.

¹⁰⁵ Id.